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No. 87-882

In the Supreme Court of the United States

OCTOBER TERM, 1987

WAYNE E. BARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the district court committed plain error by admitting his custodial confession into evidence and that, in any event, his confession was not corroborated by independent, admissible evidence.

1. Following a bench trial in the United States District Court for the Southern District of Alabama, petitioner was convicted on one count of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to do so, in violation of 21 U.S.C. 846. He was sentenced to 90 days' imprisonment, a consecutive five-year term of probation, and a $1,000 fine. He was also ordered to perform 300 hours of community service.

a. On the morning of May 10, 1985, in Mobile, Alabama, DEA Agent Gary Carter observed two vehicles with Texas license plates parked beside each other in a restaurant parking lot. One of the vehicles was a pickup truck with an enclosure over the truck bed; the other was a

late-model Chrysler. Both vehicles were equipped with two-way radios. Several men, including petitioner, were standing around the truck, and another man was sitting in the driver's seat of the Chrysler (Pet. App. A1-A2).

Aware from his 19 years' experience with the DEA that Texas is a major source of controlled substances in Mobile, Agent Carter stopped in a parking lot next to the restaurant and telephoned the local DEA office to request a computer check of the Chrysler's license plate. While Carter was on the telephone, a young man talking on the telephone next to him hung up the receiver, walked to the pickup truck, spoke to the men standing around it, and then turned in Carter's direction and pointed at him. The men quickly got into the two vehicles and drove out of the restaurant parking lot in opposite directions. Pet. App. A2-A4.

Carter returned to his vehicle and followed the pickup truck for a short distance. He then pulled beside it, displayed his badge, and instructed petitioner, who was driving, to pull over. After petitioner and his passenger got out of the truck, Carter asked petitioner for some identification. Petitioner complied with the request and remarked, "What do we do now? Did they set us up?" Carter detected the odor of marijuana; petitioner then said to Carter, "You stopped us for a reason, Gary. You know and I know what is going on." Carter then advised petitioner of his constitutional rights. Petitioner acknowledged that he understood them and then remarked, "I know you can smell the marijuana because I do." Pet. App. A4-A7.

Five minutes later, while awaiting backup assistance, Carter observed a Mobile police car passing and waved it down. He placed petitioner in the patrol car and asked whether petitioner would consent to a search of the truck. Petitioner consented and handed Carter the keys to the vehicle. In the bed of the pickup, Carter discovered 135 pounds of marijuana and a set of scales. Pet. App. A7-A8.

A few moments later, Carter's backup arrived. That officer again advised petitioner of his constitutional rights. Petitioner indicated again that he understood his rights and agreed to waive them. He then confessed to his participation in a scheme to transport the marijuana from Texas to Mobile. Later, at the local DEA office, he stated that he and an accomplice had driven the marijuana-filled truck from Texas the previous day and night and had agreed to deliver the marijuana in Mobile for $5,000. They arrived early that morning and met their contact, who was driving a 1984 Chrysler, in the parking lot of a local motel. They then followed the contact to the parking lot of the restaurant where Agent Carter first observed them. Pet. App. A8-A9.

b. Before trial, petitioner moved to suppress the marijuana that was seized from his truck, alleging that Agent Carter lacked sufficient cause to stop him. The district court agreed, finding that "[b]ased upon the totality of the circumstances, Special Agent Carter did not have a particularized and objective basis for suspecting [petitioner] of criminal activity" (Pet. App. A12).

Petitioner did not move to exclude his statements to the authorities, including his confession to Agent Carter's backup officer. The district court in any event concluded that petitioner's confession was voluntary and that it was untainted by Agent Carter's earlier unlawful stop (Pet. App. A14-A15). After finding that the confession was corroborated, inter alia, by "Agent Carter's independent observations made prior to the stop" (*id.* at A16), the trial court found petitioner guilty on both counts (*id.* at A17-A18). In an unreported judgment order, the court of appeals affirmed (*id.* at A20).

2. Petitioner contends (Pet. 19-21) that despite his failure to move to suppress his confession, the confession was inadmissible and the trial court committed plain error by failing to grant that relief sua sponte.

The trial court concluded (see Pet. App. A14)—and petitioner does not contest—that his confession was entirely voluntary. Moreover, it was twice preceded by the issuance of *Miranda* warnings. The district court nevertheless recognized, in reliance upon *Lanier* v. *South Carolina*, 474 U.S. 25, 26 (1985), that "[s]tanding alone, a voluntary confession that satisfies Fifth Amendment standards is not sufficient to purge the taint of an illegal arrest" (Pet. App. A15). Instead, such a confession must additionally be untainted by the unlawful detention. *E.g.*, *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975). The district court held that the confession in this case was not tainted.

In *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), the Court upheld the admission of incriminating statements that, as here, followed closely on the heels of an assertedly unlawful detention. There, as here, "petitioner received *Miranda* warnings only moments before he made his incriminating statements," a factor this Court deemed to be "important, although not dispositive, in determining whether the statements at issue were obtained by exploitation of an illegal detention" (448 U.S. at 107). In addition, here, as in *Rawlings*, "circumstances intervened between the initial detention and the challenged statements" that attenuated any taint from the detention (*id.* at 108-109). In *Rawlings*, the intervening circumstance of note was the discovery by police of drugs in the defendant's girlfriend's purse, prompting admissions this Court concluded were "spontaneous reactions" and thus the product "of free will unaffected by the initial illegality" (*id.* at 108 (citation omitted)). Here, petitioner's confession was prompted not by his detention but primarily by the realization that Agent Carter was able to smell the marijuana in his truck (Pet. App. A7). As in *Rawlings*, moreover, the assertedly unlawful detention in this case was neither purposefully nor flagrantly improper (see 448 U.S. at 109-110). And, as

in *Rawlings*, in this case "the relatively short period of time that elapsed between the initiation of the detention and petitioner's admissions" (*id.* at 108) did not undercut petitioner's free will. In *Rawlings*, the atmosphere existing during the period of the detention was "congenial" (*ibid.*); here, petitioner's remarks to Carter at the time of the stop show he was not in the least intimidated by the detention. Thus, no compulsion to speak arose "from the circumstances of [petitioner's] arrest." *United States* v. *Milian-Rodriguez*, 759 F.2d 1558, 1565 (11th Cir.), cert. denied, 474 U.S. 845 (1985). The district court did not err in admitting petitioner's confession.

Even assuming that the admission of the confession was erroneous, it was not plain error. As this Court recently stated in *United States* v. *Young*, 470 U.S. 1 (1985), "the plain-error exception * * * is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " 470 U.S. at 15 (quoting *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982)). It is undisputed that petitioner's confession was voluntary. There is, moreover, no doubt as to its truthfulness. This being so, its admission plainly did not result in a "miscarriage of justice." *Young*, 470 U.S. at 15.

3. Petitioner further asserts (Pet. 13-18) that he was convicted on the basis of a confession that was not corroborated by any admissible evidence. That, he claims, runs contrary to the well-settled rule that a conviction must rest upon firmer ground than the uncorroborated confession of an accused. *E.g.*, *Opper* v. *United States*, 348 U.S. 84, 89-92 (1954); *Smith* v. *United States*, 348 U.S. 147, 153-154 (1954). The district court, however, correctly held that petitioner's confession was adequately corroborated.

This Court has recognized that "[t]he rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone." *Warszower* v. *United States*, 312 U.S. 342, 347 (1941). It is, however, equally well es-

tablished that "the corroborative evidence [itself] does not have to prove the offense beyond a reasonable doubt" (*Smith*, 348 U.S. at 156). Instead, while "[a]ll elements of the offense must be established [either] by independent evidence or corroborated admissions, * * * one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused" (*ibid.*). Evidence independent of a confession, in short, is sufficient to sustain a conviction as long as it establishes the trustworthiness of the confession. *Opper* 348 U.S. at 93; accord *United States* v. *Davanzo*, 699 F.2d 1097, 1101 (11th Cir. 1983); *United States* v. *Pennell*, 737 F.2d 521, 537 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).

In this case, there was evidence independent of petitioner's confession that bolstered its truthfulness. As the district court noted, "Agent Carter's independent observations made prior to the stop * * * [are] consistent with [petitioner's] confession and support[] it as a whole" (Pet. App. A16). Petitioner confessed that he traveled from Texas with a truck filled with marijuana, that he agreed to deliver it to a contact in Mobile, and that he met his contact, who drove a Chrysler, early on the morning of his arrest (*id.* at A8-A9). Before stopping petitioner, Agent Carter observed him driving a pickup truck with Texas license plates and meeting with at least one other person in a 1984 Chrysler. Both observations are entirely consistent with petitioner's confession. The trustworthiness of petitioner's confession is further bolstered by the fact that a colleague of petitioner's felt compelled to warn his confederates that Carter was investigating them, prompting their immediate departure from the scene in different directions. In addition, as the district court noted (*id.* at A16-A17), petitioner's custodial confession is corroborated by his later, in-court admissions that he lived

in Texas and owned the truck in question, as well as his admission that he was able to smell the hidden marijuana following his stop. * Finally, because the corroboration requirement is designed to ensure the reliability of the conviction, there is no need to ignore the corroborative effect of the evidence seized from petitioner's truck, even though that evidence was suppressed at trial. The suppression of that evidence served the deterrent purposes of the exclusionary rule. The corroboration rule, however, serves a very different purpose—to ensure that the confession was reliable. The suppressed evidence provided a complete answer to that concern. In light of the very different purposes served by the exclusionary rule and the corroboration requirement, it would not have been improper for the court to rely on the suppressed physical evidence for the limited purpose of finding petitioner's confession to be sufficiently reliable to satisfy the corroboration rule.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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* Although petitioner made those statements in support of his motion to suppress the marijuana, the district court was entitled to consider the statements after petitioner elected not to object to their admission into evidence at the trial on the merits. See *Simmons* v. *United States*, 390 U.S. 377, 394 (1968) (emphasis added) ("We * * * hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt *unless he makes no objection.*").

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